Ijtihad by *Ra'y*: The Main Source of Inspiration behind *Istihsan*

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Abstract

This essay investigates the implementation of *istihsan* (juristic preference) in the early history of Islam by identifying the concept of *ijtihad* (independent effort) and *ra'y* (juristic opinion), both of which played an enormous role in the development of Islamic law. *Ijtihad* by *ra'y* (personal judgment in juridical judgment) has been practiced from the time of the Prophet, as reflected in several hadiths narrated by Mu`adh ibn Jabal (d.18/640). The Prophet taught him how to use personal discretion and encouraged the Companions to undertake *ijtihad* by *ra'y* with regard to various issues.

The criteria of personal judgment in *istihsan* indicate a direct relationship between *istihsan* and *ijtihad* by *ra'y*. The nature of *istihsan*, the wisdom behind it, and the wisdom of its use is quite considerable. As *istihsan* is considered a product of *ijtihad*, it represents simplicity, ease, and the lifting of difficulties. If the resulting *qiyas* (analogy) is not in keeping with the Shari`ah's spirit, then the ruling of similarities should be abandoned in order to give a ruling according to the special evidence that justifies its spirit.

The definitions of *istihsan*, *ijtihad*, and *ra'y*; the historical perspective of *ra'y*; the validity of *ijtihad* and its implementation at the time of the Prophet and the Companions; and the practices of *ijtihad* in terms of *istihsan* among the Companions are all explored in this paper.

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Introduction

Following the end of Revelation, Islamic law was developed with great effort by those who had the authority and expertise, despite the rapid changes in social, economic, and political life. The jurists' contributions greatly enhanced Islamic law's ability to maneuver and to be flexible. Therefore, Islamic law is described as a law made by jurists.[1]

In order to assess *istihsan* (juristic preference), it is necessary to first consider its basis, for it is possible that its main source of inspiration is *ra'y* (personal judgment). The criteria of *ra'y* indicate a direct relationship between *istihsan* and *ijtihad* (independent effort) by *ra'y*. Moreover, *istihsan* is a product of *ijtihad*. In fact, Abu Hanifah (d. 150/767) performed *ijtihad* based on his personal opinions, conforming to the Qur'an and the Sunnah, by saying: "*Qiyas* [analogy] rules this, but we *nastahsinu* (prefer) that, or we proved this by *istihsan* contrary to *qiyas*, or the *qiyas* of this is so and so and the *ijtihad* of this is so and so, and the *ijtihad* we take."[2]

A Brief Definition of *Istihsan*

In the early period of Islamic legislation, the Shari`ah's sources were confined to the Qur'an, the Sunnah, and the use of *ra'y*, with the permission of a competent authority. It is pointless to debate whether *istihsan* was applied during the Prophet's time as a source of law, since both the Prophet and the Qur'an – the actual sources of the Shari`ah – were all that was needed. Although the terminology of *usul al-fiqh* (the principles of Islamic jurisprudence) had not been systemized yet, such Companions as `Umar, `Ali, Ibn `Abbas, and Ibn Mas`ud applied the spirit of *istihsan*, if not the technical method itself.

Technically, definitions of *istihsan* have not reached us from the early Islamic period, simply because there was no reason for this term to be defined. Abu Hanifah and such other early Hanafi jurists as Abu Yusuf (d. 182/798) and al-Shaybani (d. 189/804) gave rulings via *istihsan* without providing any specific definitions or explanations. Their judgments were based on the fundamental principles of securing ease and avoiding hardship: "God intends facility and ease for you. He does not intend to put you to hardship" (2:185).

Hanafi scholars see *istihsan* as a valid Shari`ah source and a basis for formulating legal rulings. One definition, as understood by the jurists of *usul* (principles) and that reflects the definition adopted by the Hanafi jurists, who consider it accurate and comprehensive, is that of Abu al-Hasan al-

Karkhi (d. 340/952): "*Istihsan* is when one takes a decision on a certain case different from that on which similar cases have been decided on the basis of its precedents, for a reason which is stronger than the one found in similar cases and which requires a departure from those cases."[3] Any departure from a previous ruling on a certain issue, which is then applied to similar issues because of particular evidence that necessitates this departure must, according to the jurists, be justified. This is true regardless of whether this evidence is *nass* (textual), *ijma`* (consensus), *darurah* (necessity), *`urf* (custom), *maslahah* (benefit), *qiyas khafi* (implicit analogy), or otherwise, and irrespective of whether the method used to establish the ruling on the similar problem was based on *dalil `am* (general evidence), *qa'idah fiqhiyah* (jurisprudence rule), or *qiyas zahir jaliy* (apparent clear analogy).[4]

According to Jassas, *istihsan* is the "departure from a ruling of *qiyas* in favor of another ruling which is considered preferable."[5] *Istihsan* is evidence that is preferred over an accepted established ruling after ensuring that this evidence does not contravene previous Islamic legal rulings. *Istihsan* represents simplicity, ease, and the lifting of difficulties.

Ijtihad

Ijtihad is one of the most important key words of the Shari`ah, and its goal is defined as comprehending the purpose of the Qur'an and the Sunnah. The main purpose of law is to maintain the continuity of answering people's needs. A legal system that answers the questions of its era while offering solutions for future generations can be realized only by constantly renewing itself. In this sense, *ijtihad* has very important functions in keeping the law alive, which is one of the Shari`ah's main dynamics.

The Definition of Ijtihad

Ijtihad is derived from two words: *juhd* (exertion of effort or energy) and *jahd* (the forbearance of hardship, namely, striving and self-exertion in any activity that entails a measure of hardship). Thus, it would be suitable to use *jahada* for one who carries a heavy load, but not if he/she carries a trivial weight. *Ijtihad* is the expenditure of effort to arrive at the correct judgment, whether physical (e.g., walking or working) or intellectual (e.g., inferring a ruling or a juristic and linguistic theory).[6]

Technically, the juristic meaning of *ijtihad* has several definitions according to the *usuli* scholars. Some define it as the jurist's action and activity to reach a solution. Al-Ghazzali (d. 505/1111) defines it as the "total

expenditure of effort made by a jurist for the purpose of obtaining the religious rulings."[7] Al-Amidi (d. 631/1233) considers it to be the expenditure of one's total effort in search of *zann* (probability), to the extent that the jurist feels obliged to exert himself/herself further in proving that the ruling is correct. His definition implies that it is not enough just to exert effort; rather, the jurist should feel that he/she has spared no effort to pursue the issue further: "*Ijtihad* is the application of the jurist using all of his faculties, either in inferring the Shari`ah's practical rules from the sources or in implementing such rules and applying them to a particular issue."[8] The Shari`ah's definitive rulings that are known by necessity are therefore excluded from *ijtihad*, such as the Five Pillars of Islam¸ rulings related to the *`aqidah* (creed), and realizing the attributes of God, all of which are determined by explicit textual statements. There is only one correct view in regard to these matters, and anyone who differs is wrong.[9]

Al-Qarafi (d. 684/1285) defines *ijtihad* as "the expenditure of total effort while considering a case which is condemned by religion."[10] Al-Isnawi (d. 772/1370) explains it as "the expenditure of effort to arrive at and realize the rulings of the Shari`ah, whether definitive (*qat`i*) or probable (*zanni*)."[11] Kamal ibn al-Humam (d. 861/1457) describes it as the expenditure of efforts by the *faqih* (jurisprudent) to arrive at a juristic ruling, such ruling being either rational (*`aqli*) or transmitted (*naqli*), definitive (*qat`i*) or speculative (*zanni*).[12] Ibn Hazm (d. 456/1064) differs and interprets it as "investigating the rules of God solely in the Qur'an and in the Sunnah."[13] Fazlur Rahman (d. 1988) defines it technically as "the effort to understand the meaning of a relevant text or precedent in the past, containing a rule, and to alter that rule by extending, restricting or otherwise modifying it in such a manner that a new situation can be subsumed by a new solution."[14]

The Validity of Ijtihad

Many Qur'anic verses appear to validate *ijtihad*: "Verily, in these things are *ayat* (e.g., proof, evidences, lessons, signs) for people who reflect" (13:3); "Verily, in these things are *ayat* for the people who understand" (13:4); and "Surely, We have sent down to you (O Muhammad) the book (this Qur'an) in truth that you might judge between people by that which God has shown you" (4:105). These verses support the use of *ijtihad* by *qiyas*.[15] The following verses obviously indicate its validity: "And consult them in their affairs" (3:159) and "… who (conduct) their affairs by mutual consultation" (42:38).

In addition, many hadiths validate *ijtihad*. `Amr ibn al-`As (d. 65/684) narrated that he heard the Prophet say: "If a jurist exerts efforts and arrives at

a correct ruling, he will be rewarded twice. If he arrives at an errorenous ruling, he will be rewarded once."[16] According to Mu`adh ibn Jabal's (d. 18/640) famous hadith:

> The Prophet asked: "How will you judge when the occasion of deciding a case arises?" He replied: "I shall judge in accordance with God's book." The Prophet asked: "(What will you do) if you do not find guidance in God's book?" He replied: "(I will act) in accordance with the Sunnah of the Messenger of God." The Prophet asked: "(What will you do) if you do not find guidance in the Sunnah of the Apostle of God and in God's book?" He replied: "I shall do my best to form an opinion and spare no pains." The Apostle of God then patted him on the chest and said: "Praise be to God who helped the messenger of the Apostle of God to find a thing which pleases the Apostle of God."[17]

According to Muhammad al-Dasuqi, all jurists are to use *ijtihad* that is valid and unanimously accepted. Undertaking it is a key to the ongoing development of Islamic law and opens a gate to *fiqh* that will develop the law when dealing with new issues. He further says that its use is a kind of revelation of Islamic *fiqh*.[18]

Ra'y (Opinion)

The word *ra'y* is derived from the verb *ra'a* (to see something or somebody), which was used later on as a verbal noun. It may also denote a dream or a vision, a view, that which is known by the heart but cannot be seen with the eyes (i.e., an opinion),[19] or *i`tiqad* (faith, belief), *zann* (assumption), *`ilm* (knowledge, science), *`aql* (reason, intellect, mentality), *tadbir* (precaution), and *isabah* (target).[20]

Ibn al-Qayyim (d. 751/1350) points out that one aspect of *ra'y* is "after considering a subject and making a judgment from the heart, a search through the evidence and inferences, both of which have their own considerations, is made to implement the truth, reality."[21] Raghib al-Isfahani (d. 502/1109) defines *ru'yah* as "to perceive an object which is seen." This perception is divided into the following parts: (1) the five senses and that which replaces the senses in a similar activity; (2) *wahm* (illusion, false impression) and *tahayyul* (imagination), (3) *tafakkur* (contemplation), and (4) *`aql* (intellectual faculty) and *idrak* (perception).[22]

Studying *ra'y* from the historical perspective shows that there have been different views as to its first use. The majority of scholars state that its use began during the Prophet's lifetime. An alternative point of view with regard to the ruling being based on *ra'y* suggests that *ra'y* was used only after the

Prophet's death, when the Companions were faced with issues that had not been detailed in the Qur'an and the Sunnah. This view is disputed by such scholars as Ibn Khaldun (d. 808/1405) and Ibn Hazm. Ibn Khaldun writes: "The rulings had been taught either during the time of the Prophet through revelation, which was sent to the Prophet, or his direct speeches and attitudes; therefore, it was unnecessary to apply intellectual reasoning or *qiyas*."[23] Ibn Hazm says: "The claim that *ra'y* appeared at the time of the Companions had nothing to do with the Companions' actions, contrary to the report that the Companions used *ra'y*; the validity of such reports and narrations is uncertain."[24] According to these scholars, the sources of Islamic law at the time of the Prophet were confined to the Qur'an and the Sunnah. *Ijma`* took shape after the time of the Companions, and *qiyas* was used when a ruling did not have a *nass* (textual) reference in the main sources of guidance.[25]

The Relationship between *Iijtihad* and *Ra'y*

The *usuli* scholars have called the practice of inference to reach a ruling *ijtihad*, *qiyas*, or *ra'y*.[26] There are different views on whether *ra'y* is a kind of *ijtihad* or *qiyas*. For example, al-Shafi`i (d. 204/819) says that *ra'y* is not based on a validated source of the Shari`ah, but that it is only a making of inferences that depends purely on intellectual reasoning and inclination. Therefore, he criticizes scholars who used it in their *ijtihad*. He also considers *ra'y* and *qiyas* to be opposed to one another.[27] Al-Ghazzali sees *ra'y* and *qiyas* as synonyms: "*Ra'y* consists of comparing and representing any ruling to itself."[28]

Some jurists, particularly Shafi`i scholars, opine that *ra'y* is synonymous with *qiyas*. Taking into account the practice of the Companions and the Successors, some scholars view it as a kind of comprehensive method of *ijtihad* consisting of *qiyas*, *istihsan*, *al-masalih al-mursalah* (consideration of the public interest), and *sadd al-dhara'i`* (blocking the means).[29] Al-Sarakhsi (d. 483/1090) believes that *ra'y* is more extensive than *qiyas*. For example, he interprets "Then take admonition, O you with eyes (to see)" (59:2) by saying that *i`tibar* (admonition) means practicing *ra'y* in place of that which has no *nass* and *qiyas*."[30] `Abd al-Wahhab Khallaf (d. 1956), who defines it as "analogizing and thinking in order to reach the right ruling in a field where no *nass* is available by the Shari`ah provided for the purpose of inference," says that *ra'y* is more comprehensive than *qiyas*.[31]

Al-Shawkani (d. 1250/1834) points out that *ra'y* could have been applied to explaining and interpreting the *nass*: "*Ijtihad* by *ra'y* can be the way of inference from the Qur'an and the Sunnah. It was originally permit-

ted in the Shari`ah for the consideration of benefit and in cases of necessity."[32] Fathi Dirini believes that confining *ijtihad* to *ra'y* on issues that have no *nass* is incorrect, for he says that the Companions' interpretations should also be included in the circle of *ijtihad* by *ra'y*. For example, when Abu Bakr was questioned on *kalalah* (a matter dealing with inheritance),[33] he replied: "I will express my point of view on this issue. If it is correct and rightly done, then it is from God; if I fall into error, then it is from me and from Satan."[34]

Accordingly, we can see that *ra'y* has virtually the same meaning as *ijtihad*. The Companions applied *ijtihad* by *ra'y* according to their perception of the Prophet's action.[35] However, it is clear that *ijtihad* is more comprehensive than *ra'y*. At the time of the Companions and the Successors, the constituent parts of *ra'y* were clear and extensive, as opposed to the *nass*, which was not obviously clarified and defined. Following that period, some jurists continued to use *ra'y*, in the meaning of *ijtihad*, in a wider range. At the same time, the majority of jurists confined the use of inference to issues on which no *nass* was available to reach a right and just ruling. In addition to *qiyas*, they also used *istihsan*, *al-masalih al-mursalah*, *sadd al-dhara'i`*, and *`urf* that agreed with the Shari`ah's general aim and spirit. Hence, the field of *ra'y* is narrow when compared to that of *ijtihad*. However, it is more comprehensive than *qiyas* and, consequently, is called *ijtihad* by *ra'y*.[36]

Ijtihad by *Ra'y* at the Time of the Prophet

Muslim scholars disagree on whether the Prophet performed *ijtihad* by *ra'y* on such issues as daily maintenance, the rules related to war and peace or attack and defense, or solving disputes or juridical and political issues.[37] According to Ibn al-Humam, some Hanafi jurists confined his *ijtihad* by *ra'y* to *qiyas* in situations where there was no revelation.[38]

At this time, many rulings and legislations were determined by *wahy* (revelation). Problems were solved either by revelation or by the Prophet through inspiration. Even in situations where there was no revelation, the Prophet used his knowledge-based experience and *ra'y* to perform *ijtihad*. He is reported to have said: "When I do not receive a revelation, I adjudicate among you on the basis of my opinion."[39] If he made a mistake, it was corrected through subsequent revelations.[40]

Revelation enabled the Prophet to give general rules of guidance for social issues during his time and for future generations, thereby ensuring that Muslims could carry out their affairs.[41] However, according to the Ash`aris, the Mu`tazilah, Ibn Hazm al-Zahiri, and some Hanbali and Shafi`i scholars, the Qur'an provides clear evidence that every utterance of the Prophet par-

takes of *wahy*: "He says nothing of his own desire; it is nothing other than revelation sent down to him" (53:3). In other words, all of his rulings consist of divine revelations and are not considered *ijtihad*.[42]

Another view is that we cannot judge his situation due to the evidence's conflicting nature. This view is attributed to al-Shafi`i and upheld by al-Baqillani (d. 403/1013) and al-Ghazzali. Al-Shawkani, however, rejects the idea that the Qur'an gives us clear indications that *ijtihad* was permissible for the Prophet and that he could make mistakes.[43] On the other hand, the ulama who support this view say that any errors that the Prophet might have made were rectified either by him or through a subsequent revelation.[44] For example, the Qur'an rebuked him for one of his mistakes: "It is not fitting for a Prophet that he should have prisoners (of war) until he has thoroughly subdued the earth" (8:67).

This verse was revealed concerning the reported seventy captives taken during the Battle of Badr. The Prophet first asked Abu Bakr what should be done with them. Abu Bakr suggested that they should be ransomed, whereas `Umar ibn al-Khattab opined that they should be executed. The Prophet approved of Abu Bakr's view, but then the verse disapproving of such an action was revealed. Elsewhere, God asks the Prophet: "God granted you pardon, but why did you permit them to do so before it became clear to you who was telling the truth?" (9:43). This verse shows that the Prophet pardoned those who did not participate in the Battle of Tabuk. These verses indicate that the Prophet had, on some occasions, acted on his own *ijtihad*, for if he had followed a divine command, there would have been no cause for a reprimand or the granting of divine pardon for his mistakes.

Several narrations document the use of *ijtihad* by *ra'y*. For example, when the Prophet saw the people of Madinah fertilizing palm trees, he forbade it. But when he heard that the trees had become barren, he said: "I'm a human being. If I order you to do something in the name of your religion, then conform to it. However, if I order something that depends on my personal *ra'y*, I am only a human being."[45] In another narration, a woman from Juhayna asked him: "My mother vowed to make a pilgrimage, but she died before she could fulfill the vow. Can I do it in her name?" The Prophet replied: "Yes, fulfill the pilgrimage instead of her. If your mother had a debt, would you not pay it? Pay your debts (fulfill your promises), because God fulfills promises too."[46] Here, the Prophet compares two similar things, showing that to fulfill a promise made to God is the same as fulfilling a promise made to a human being. This type of analogy is called *awla'*.[47]

Another example of *qiyas* is as follows. A nomad tried to reject his ancestors by telling the Prophet: "My wife gave birth to a black baby." The

Prophet asked: "Do you have grey camels among your red ones?" When the nomad said that he did, the Prophet asked: "Where did they come from?" The nomad said: "They presumably look like their ancestors." The Prophet then told him: "Your child presumably also looks like his ancestors."[48]

The Prophet preserved most of the pre-Islamic Arabic customs, although a few were changed, such as trade, pawn, rent, *salam* (contract of purchase of goods with pre-payment), marriage, equality between husband and wife, and murder.[49] When the Prophet came to Madinah, he saw that its people were making *salam* agreements for one or two years. To emphasize this, he said: "Anyone who makes *salam* agreements should do this according to specific measurements and for determined periods."[50] This practice, which was common among the Arabs, was practiced freely after a few amendments.[51]

Thus, the Prophet applied and practiced *ijtihad* by *ra'y* and trained the Companions to follow his example. His instruction was practical rather than theoretical. The Prophet's practice of *ijtihad* by *ra'y* provided the example for *qiyas*, *istihsan*, *maslahah*, *sadd al-dhara'i`* and *`urf*.

The Companions' Use of *Ijtihad* by *Ra'y* by

There is evidence that the Companions performed *ijtihad* by *ra'y* both in the Prophet's presence and absence[52] concerning such matters as the *adhan* (the call to prayer), *ghusl* (ritual ablution of the whole body), and postponing the prayer. The Prophet included rulings pertaining to law within the range of *ijtihad*.[53] During the time of revelation and as long as there were no explanations or prohibitions from God, the Companions considered *ijtihad* permissible.[54]

When an issue arose and no relevant Qur'anic verses could be found, the Prophet performed *ijtihad* by *ra'y*. He also authorized the Companions to use the same method under the same circumstances.[55] For example, Mu`adh ibn Jabal, `Amr ibn al-`As, and `Uqbah ibn `Amir (d. 58/677) performed *ijtihad* in his presence.[56]

Mu`adh ibn Jabal's hadith, "I shall spare no pains to do my best to form an opinion,"[57] has already been mentioned. Other examples are as follows: During the Battle of Dhat Thalasi, `Amr ibn al-`As led a group of soldiers. While fighting, he entered the state of *junub* (requiring a ritual ablution of the entire body). Afraid that such an ablution made during the severe cold might kill him, he made *tayammum* (using clean sand or soil when water is unavailable) and led the prayer, saying: "God says in the Qur'an: 'Do not kill yourselves.'" When he returned, he told the Prophet what he had done, and the

Prophet approved of it.[58] Due to his fear, `Amr applied a practice that was permissible when there was no water or when the person was too ill to use it. I agree that `Amr used a form of *istihsan* by taking ease as the basis of his decision, in accordance with the Shari`ah's spirit but contrary to the general rule.

When he was a *qadi* (judge) in Yemen, `Ali used *ijtihad* by *ra'y* when deciding which of the three men who had had sexual intercourse with the same woman over a certain period of time was the father. He asked them to draw straws, saying that whoever drew the shortest straw would have the child acknowledged as his and would pay two *diyah* (monetary compensation) to the other two. When the Prophet learned of this, he acknowledged the correctness of `Ali's action.[59] Muhammad ibn Hasan al-Hajawi (d. 1956), considers this ruling a form of *istihsan*.[60] If this or any similar issues arose today, modern technology would be the vehicle used to confirm paternity. Thus, using technology can be a method of *istihsan* based on *maslahah*.

During the Prophet's lifetime, both he and the Companions, with his permission, used *ijtihad* in light of the Shari`ah. Accordingly, personal judgment and human contributions were integrated into the life of Islamic law. This integration is not regarded as strange, for the law's cornerstone, the *maqasid al-Shari`ah* (the law's objectives), has to be taken into consideration when performing *ijtihad*.

Ijtihad in Terms of *Istihsan*

Al-Karkhi defines *istihsan* as "the principle which authorizes departure from an established ruling to similar cases and authorizes applying an alternative established ruling to cases similar to those which set the precedent." The departure is authorized only when there is enough reason to justify it.[61] Doing this in the case of a certain issue, one that had been applied earlier to a similar case, to another ruling must be based on clear evidence established, in the jurists' opinion, by *nass*, *ijma`*, *darurah*, *`urf*, *maslahah*, *qiyas khafiy* (implicit analogy), or other sources. This is true irrespective of the methods upon which the earlier, similar ruling depended, such as *dalil `am* (general evidence), *qa'idah fiqhiyah* (jurisprudence rule), or *qiyas zahir jaliy* (apparent clear analogy). This is the meaning of *istihsan* according to Hanafi jurists; other jurists, especially Maliki scholars, also apply this definition.[62]

Sometimes an issue is included within the range of a settled general rule with the common characteristic of *nass* or in the light of some evidence. However, another specific evidence can be a *nass*, *darurah*, *`urf*, or *maslahah* that can be used in opposition to the common *nass* or the common rule. The *mujtahid* (competent jurist) must be convinced that this specific evi-

dence is to be preferred before abandoning the practice of the common *nass* or common judgments used in such issues, and judge according to the specific evidence.

Sometimes when an issue is not within the range of a *nass*, *qiyas* is used. Here we come across two different possibilities: apparent clear analogy and implicit analogy (*khafi qiyas*). If the *mujtahid* finds that the second one is stronger, the judgment given, accordingly, is called *istihsan*.[63] Through *istihsan*, some issues within the range of the common *nass* and such criteria as difficulty, complexity, *darurah*, and need are removed because of their specific nature, and a new judgment is given to implement the *maslahah*.

If one studies the *nass* from the Qur'an and the Sunnah, many examples can be found. *Istihsan* is used to remove the common *nass* or a settled rule from its area of application. The *mujtahid* who applies this principle applies the essence of what the Shari`ah wants in any given situation or place in order to remove harm or discomfort and establish *maslahah*.[64] In the general sense, *istihsan* is concerned with *maslahah* and the *mujtahid* uses his/her judgment in the context of general rules by proving a stronger evidence pertaining to the particular situation. The basis for the *mujtahid's* judgment could be *darurah*, *maslahah*, *`urf*, *ijma`,* or the *nass* of the Qur'an or the Sunnah. In the latter case, God becomes the one who actually gives this exceptional judgment, the one who performs *istihsan*, and it is by His announcement that this *istihsan* becomes legal.[65]

As such, the *Shari`* (the Lawgiver) considers the special situations and circumstances with specific conditions and then abolishes the difficulty, complexity, and harm. This provides an ideal guide for the *mujtahid*. On this issue, Mustafa Zarqa' says: "The Qur'an and the Sunnah are both *istihsan*, which is the creation of the *Shari`*. The concept of *istihsan* is to guide the *mujtahid* when applying the *nass* of the *Shari`* to issues of life. The *mujtahid* makes *istihsan* inspired by the method that the *Shari`* applies, and in this way the *mujtahid* implements the *Shari`'s* purpose and intentions."[66]

The messenger and explorer of the Qur'an is the Prophet, who applied the method taught by the Qur'an from the general *nass* and established rules for exceptional conditions and circumstances. Various examples can be found in the Sunnah. Before we examine these issues, I shall give a few examples mentioned in the Qur'an.

Qur'an 24:4 says: "And those who accuse chaste women and produce not four witnesses, flog them with eighty stripes and reject their testimony forever." As stated, the accusation of adultery has a more damaging effect on society than the action itself. The "general sentence" for a man who has seen a woman commit adultery is flogging. However, if he is her husband, then,

according to the general sentence, he should stay silent or come forward with four witnesses. Failure to produce these witnesses after coming forward will result in his being flogged for *qadhf* (slander, accusation). This sentence obviously causes the husband to suffer. Therefore, if he cannot substantiate his claim, the court can, according to Qur'an 24:6 and the following *surah*, dissolve the marriage. In such a case, he would not be punished for *qadhf*.[67]

According to the general rules, fasting during Ramadan is obligatory for every adult Muslim with the exception of, among others, those who are ill or traveling: "And whoever is ill or on a journey, the same number of days which one did not fast must be made up from other days. God intends for you ease, and He does not want to make things difficult for you" (2:185). This is prescribed because of the special circumstances: the difficulties that may arise.[68] If the general sentence of the obligation of fasting were to be applied to the sick and the travelers, such difficulties and sufferings might only delay the healing process or lead to the sick person's death. Such a result would contradict the *Shari`'s* general aims, among which are "to protect human life."

Among the Prophet's Sunnah based on *istihsan*, some of the *ijtihad* by *ra'y* practices are as follows. A business contract known as *salaf* or *salam* allows a person to sell something in return for cash and to show a commitment to deliver it in the future.[69] There are two *nass* concerning this issue. One is general and concerns such a contract's invalidity. The Prophet told Hakim ibn Hizam: "Do not sell something that you don't own."[70] The second is more specific and concerns such a contract's validity. When the Prophet moved to Madinah, he saw that its people made *salam* sales for one and two years regarding their produce. He said: "Those of you who sell goods with *salam* should do this according to stated measurements, scales, and time."[71] The reason why he changed his earlier ruling was the people's present needs.[72]

The general sentence for theft is: "Cut off (from the wrist joint) the (right) hand of the thief, male or female, as a recompense for that which they committed, a punishment by way of example from God" (5:38). During a battle, a man who was caught stealing was brought to Busr ibn Artai, the commander. He ordered the thief to be beaten but did not have his hand cut off, for: "The Prophet prohibited us from severing hands during war-time."[73] The general ruling of the *nass* was leniency, thereby lessening the possibility the thief might join the enemy, something that would cause serious problems.[74] When two problems occur, the lesser of the two evils is to be preferred.[75] This principle is taken from the general *nass* of the *Shari`*.

During the Battle of Badr, Khabbab ibn Mundhir asked the Prophet about the first place picked for the camp: "O, Messenger of God. Is this a place that

God has disclosed and we have to accept, or is it a *ra'y* or a war strategy?" When the Prophet answered: "No, it is a *ra'y* and a war strategy," Khabbab replied: "This is not an appropriate place. I suggest that we set up camp by the water, make ourselves a pond, fill it with water, and close all of the other wells. This will deprive the enemy of water." The Prophet accepted this suggestion and changed the place.[76] The Prophet, by comparing the enemy to other living beings, might have made the following *qiyas*: "You can't deprive them of water, just as you can't deprive these of water." However Khabbab, considering that it was a time of war and that the enemy did not have the right to live, came to a different conclusion.[77] In the end, Khabbab's opinion was chosen, as it was more likely to further the cause of the Muslims.

The Prophet asked his Companions on the day of the Battle of Khandaq about reaching an agreement with the Gatafan polytheists: one-third of Madinah's fruits if they would leave the battlefield. Sa`d ibn Mu`adh and Sa`d ibn `Ubadah said: 'If this is God's will, we will listen and obey God's order. If this is not a revelation but a *ra'y*, we will only give them swords, because during the Days of Ignorance, when neither of us had a religion, they could only get Madinah's fruits by buying them from us or if we treated them. Now when God has honored us with His religion, we refuse to offer them anything except disparagement, and we swear that we can only give them our swords." After this, the Prophet said: "I saw that the Arabs came together to be one against you, and I wanted to send them away. You have the right not to accept it. There is no problem."[78] They insisted on their views.

These examples, which are *nass* from the Qur'an and the Sunnah, show that in special circumstances one of the *Shari`'s* common goals is to remove difficulties and complexities, thereby confirming the principles of public need and interest. These rulings show that it is important to note the differences between similar events. One should not always look at events categorically, generally, or prescriptively. If there are differences, it is necessary to make a ruling based on merit. Apparently, it would be wrong to apply *qiyas* to events that appear to be in the scope of general rules and then attempt to include the resulting ruling as a general rule when, in fact, it is an exceptional one. In circumstances like these, the correct way is to evaluate events with special features according to merit, namely, to apply *istihsan*.[79]

The Prophet rejected a request to fix the price of goods, as doing so might be unfair to the seller.[80] However, Sai`d ibn al-Musayyab (d. 94/712), Rabi`ah ibn Abi `Abd al-Rahman (d. 136/753), Yahya ibn Sa`id al-Ansari (d. 147/760), and other jurists made a juridical decision regarding the pricing of goods based on their personal opinions of the day's economic climate.[81] Those scholars believed that understanding the *maslahah* is crucial to pro-

tecting people from incorrect rulings.[82] According to al-Shaybani, Ibrahim al-Nakha`i said:

> Supposing someone murdered someone else at his front door and alleged that he committed the crime in order to protect his goods and honor. To be able to give a verdict, an investigation is carried out. The case may have two possible outcomes. In the first scenario, the law of retaliation is not applied, but the blood-money has to be paid even if the victim is guilty of stealing. However, if the victim is known to be a respectable man, then the law of retaliation must come into effect. In the second scenario, the law of retaliation is also dropped, but the blood-money is paid, even if the victim is guilty of adultery and/or fornication. However, the murderer will be prosecuted if the victim is known as a person who is chaste and virtuous.[83]

He gives more consideration to the spirit of the *nass* rather than to its literal meaning, neither rejecting nor applying the law of retaliation based on false testimony, but rather supporting his claims with evidence and thereby avoiding incorrect judgments. In other words, he considers nothing other than the *maslahah*.[84]

In the view of some Iraqi scholars, the law of retaliation with regard to stolen goods comes into effect only when their value exceeds a certain amount. For them, this minimum is five dirhams (silver coins), although the generally accepted minimum is usually ten. The minimum value of stolen goods is extrapolated by *qiyas* from the minimum value of the marriage dowry. However, these scholars disagreed: "We are surprised that entering into a sexual relationship is allowed by so little an amount." In addition, Ibrahim al-Nakha`i thought that the dowry should not be less than forty dirhams and thus resorted instead to *istihsan*, which yielded more useful results than *qiyas*.[85]

At the time of the Companions and the Followers, to be a witness in court for the defense of close relatives (e.g., one's father or child) was allowed in accordance with the belief that "everybody's testimony is valid if he is Muslim and righteous."[86] However, over time and the inevitable weakening of the Muslims' faith, jurists concluded that this ruling might no longer serve society's needs, since the possibility of bias and injustice would bring untold harm to the social fabric. Thus they rejected the testimony of relatives to prevent corruption and preserve justice and social harmony. The juristic decision was confined to offspring, fathers, brothers, and spouses.[87]

According to Islamic law, a widow's mourning period should last for four months and ten days, during which time she should not use kohl or perfume. A woman asked the Prophet if her widowed daughter could use kohl

to aid her painful eyes. In spite of her insistence, the Prophet said "No" three times.[88] However, Imam Malik (d. 179/795), Salim ibn `Abd Allah (d. 106/724), and Sulayman ibn Yasar (d. 107/725) rule that a woman in such a situation may cure her eyes with kohl or another medicine.[89] While there is no possibility that these Followers would oppose the Prophet's saying, they considered his prohibition as applying only to that particular woman, as her condition did not necessitate the use of kohl. Their judgment was correct, based on their desire to avoid hardship (*raf `al-haraj*) and attain benefit.[90]

Istihsan among the Companions

Even though the term *istihsan* had not been used in the technical sense before the Iraqi school appeared, it existed in practice during the time of the Companions and was widely applied.[91] An allusion to this can be found in `Umar's letter to Abu Musa al-Ash`ari: "Research similar cases, and when you find similarities that affect the ruling, apply the method of *qiyas*. Using the results of *qiyas*, select the ruling that adheres to the Islamic principles and ensures that your conscience is satisfied that justice has been served."[92] According to the first part, `Umar wanted *qiyas* applied as soon as the similarities were found and the result was deemed just. However, in the second part he says that if this is not possible, then a ruling that accords with the basic principles of justice and equity should be given. In other words, if the resulting *qiyas* is not in keeping with the Shari`ah's spirit, then the ruling of similarities should be abandoned to give a ruling according to the special evidence, that is, justice and equity (*istihsan*).[93]

I will now give some examples of the Companions' *istihsan.* Muslim men are allowed to marry Christian and Jewish women (5:6). `Umar accepted this in principle, but prohibited it because he thought it would be detrimental to Muslim women.[94] In this example, we see conformity to the *maslahah* together with the principle of understanding and applying Qur'anic verses and hadiths by considering all the *nass*. `Umar gave a ruling that is opposed to the general ruling of the *nass* in this special situation, according to the Shari`ah's objective and spirit.[95]

According to the general ruling of *nass*, those who inherit through *`asabah* (agnates) inherit what remains after those who are entitled (*ashabi furud*) have received their shares. If nothing remains, then they will receive nothing.[96] In one particular case, `Umar acted according to the general basic rule[97]: the wife, mother, and siblings from the same maternal mother but from a different father, along with the full brothers and the half-brothers from the *`asabah*, all acted according to its basic rule. Full brothers share by

virtue of having the same mother, a practice known as *mushtarikah* (shared), because the brothers share in the third. This is the rule in every case in which there is a husband and a mother or a grandmother, and two or more of the mother's offspring, and *`asabah* in the form of full siblings. This is also known as the *himariyah* case, for when it was presented to `Umar, he wanted to exclude the full brothers. They objected, saying: "Consider this. If our father was a donkey (*himar*), do we not have the same mother?" So he studied the case again and proclaimed a third for all of them equally, full and uterine siblings, the man's portion being the same as the woman's.[98]

In this case, according to the general ruling of the *nass*, the full brothers should have been deprived of their inheritance, as mentioned above. However, after `Umar understood that this was not in accordance with the Shari`ah's general objective and spirit and that it did not accord with justice and equity, he changed his opinion in accordance with *istihsan*.

The general ruling of Islam regarding conquered land and war booty is that they should be divided among the war veterans:

> And know that whatever booty that you acquire [in war], verily one-fifth of it is assigned to God and the Messenger, (and also) the relatives, the orphans, the poor who beg, and the wayfarer. [This you must observe] if you believe in God and in that which We sent down to Our servant (Muhammad) on the day when truth was distinguished from falsehood, they day when the two forces met in battle [at Badr]. And God is able to do all things. (8:41)

> And what God gave as booty to his Messenger from them, for which you made no expedition with either cavalry or camelry. What God gave as booty to His Messenger from the people of the townships, it is for God, His Messenger, the kindred [of deceased Muslims], the orphans, the poor who beg, and the wayfarer, in order that it may not become a fortune used [only] by the rich among you. (59:6-7)

Nevertheless, this general ruling was not applied to the conquest of Iraq and Syria during `Umar's time. On the contrary, `Umar thought it would be more convenient to make this land the Muslims' common property, for this would leave it in the hands of its owners, taxes could be levied upon it, and the resulting revenue could be used to pay the wages of judges, officials, and soldiers as well as to help widows, orphans, and those in need. In this, `Umar was forward-thinking, believing that these taxes would benefit future generations.[99] Therefore, he abandoned the general ruling and devised a new one that would implement the *maslahah* for future Muslims.[100]

A woman from Sana' and her lover plotted to kill her husband. Ya'la ibn `Umayyah, the city's governor, reported this to `Umar, whose view was similar to the general ruling of the *nass:* Two people should not be executed for the killing of one. `Ali defended the judgment to execute both of them, in accordance with the spirit of the law of retaliation. Eventually, `Umar was persuaded and wrote to Ya'la: "Execute them both. If, by any chance, the whole city of Sana' were involved in this murder, I would have had them all killed."[101] By this example of *ijtihad*, `Umar and `Ali gave a ruling that did not accord with the relevant Qur'anic verses:

> O you who believe. *Al-qisas* (the law of equality in punishment) is prescribed for you in the case of a murder: the free for the free, the slave for the slave, and the female for the female. But if the relatives (or one of them) of the murdered (person) forgive their brother (the killer) something (i.e., not to kill the killer by accepting the blood-money in intentional murders), then the relatives (of the victim) should demand blood-money in a reasonable manner, and the killer must pay with handsome gratitude. This is alleviation and a mercy from your Lord. So after this whoever transgresses the limits he shall have a painful torment. (2:178)

> And We ordained therein for them: life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal. (5:45)

`Umar considered this in the beginning and so did not want to apply the retaliation punishment. However, with `Ali's contribution, the incident was studied in greater detail, which led to the view that this particular punishment should be applied, in keeping with the demands of *maslahah* and the Shari`ah's goal and spirit. The basis of this punishment is to implement justice and prevent further injustice. Thus, if *istihsan* had not been applied, justice would not have been implemented and the door would have been opened for people with evil intentions.[102]

As seen, the Companions' *ijtihad* is covered by the term *istihsan*. In all of these examples, the rule of law was changed when conditions changed and a fresh situation emerged.[103] They did not act in accordance with the given rules; instead, they acted according to their own initiative and principles, in keeping with the demands of *maslahah* and removing harm.[104] Consequently, as has been indicated, the work of *ijtihad* never stops; rather, it continues progressively.

Thus, we see that the Companions actually practiced *ijtihad* based mostly on *shura* (consultation), for there were no written juristic principles

on which to base their rulings. During this period, the *mujtahidun* and the *muqallidun* (the close and faithful followers of established rules) were indistinguishable from each other. *Ijtihad* was not restricted to any one individual or school of thought. When the *nass* was silent or not clearly identified, the Companions applied their personal opinions and anyone could undertake *ijtihad*.[105]

Conclusion

The source of law during the first period was the Qur'an and the Sunnah. The growth of Muslim society engendered different social issues and problems, which meant that the established law based on the Qur'an and the Sunnah needed to be reconsidered, expanded, and reinterpreted to give adequate answers to new issues. As a result, Islamic law made improvements according to the circumstances of the era. This practice is ongoing.

The independent reconsidering and interpretation of the law was known as *ijtihad*. *Ra'y* was the main element of *ijtihad* and became widespread, gradually paving the way for the development of *qiyas* and *istihsan*.[106] For many years, it was believed that only those with an outstanding intellectual ability could be involved in the process of rational rule-making. Qur'an 47:24 strongly encourages people to contemplate every single verse and then apply their intellect and personal opinion to the new legal issues. The Prophet is a good example of this practice, for he always considered the Companions' opinions regarding those issues on which the *nass* was silent.

The problems faced by the Muslim community were solved easily and effectively during the Prophet's lifetime, as he was the supreme authority to comment on the verses and explain them to the people. Following his death, the problems increased and became more complex. The Companions had the Qur'an and the Sunnah to guide them concerning the new issues that emerged from the Muslim community's increasingly complex social life. They also used their own opinion to decide which verses or hadiths could be applied to a particular case. Thus, they employed their own opinion in order to understand the verses correctly and then apply them to new situations, and to devise solutions for the more problematic cases in the absence of any clear verses.

The examples given above indicate that *ijtihad* by *ra'y* was used during the Prophet's lifetime to solve new problems. These two concepts, *ijtihad* and *ra'y*, produced several legal methods for developing Islamic law. In particular, *istihsan* received inspiration from the generosity of the judicial power of *ijtihad* and *ra'y*.

Endnotes

1. Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 212; Sawa Pasha, *Islam Hukuku Nazariyati*, tr. Baha Arikan (Ankara: 1965), 2:354.
2. Muhammad Mustafa Shalabi, *Usul al-Fiqh al-Islami* (Beirut: 1986), 258.
3. `Abd al-`Aziz al-Bukhari, *Sharh Kashf al-Asrar `ala Usul al-Bazdawi* (Beirut: Dar al-Kutub al-`Arabi, 1394), part 4, p. 3.
4. Sha`ban M. Isma`il, *Usul al-Fiqh al-Muyassar* (Cairo: Dar al-Kutub al-Jami`i, 1415/1994), 144-45.
5. Muhammad Hashim Kamali, *Istihsan*: *Juristic Preference and Its Application to Contemporary Issues* (Jeddah: Islamic Development Bank, IRTI, 1997), 24; Jassas Abu Bakr Ahmad ibn `Ali al-Razi, *Al-Fusul fi al-Usul*, ed. Ajil Jasim al-Nashmi (Kuwait: Wizarat al-Awqaf wa al-Shu'un al-Islamiyyah, 1988), 4:234.
6. Ibn Manzur, *Lisan*, "Juhidah" (n.p.: n.d.), part 2, pp. 133-34.
7. Al-Ghazzali, *Al-Mustasfa* (n.p.: n.d.), 2:350.
8. Al-Amidi, *Al-Ihkam*, (n.p.: n.d.), 3:204.
9. Ibid.
10. Al-Qarafi, *Sharh*, (n.p.: n.d.), 189.
11. Al-Isnawi, *Nihayat*, (n.p.: n.d.), 2:232.
12. Ibn al-Humam, *Al-Tahrir fi al-Usul*, (n.p.: n.d.), 3:291.
13. Ibn Hazm, *Al-Ihkam*, 41:977, 1155; and *Ibdal al-Qiyas*, 42.
14. Fazlur Rahman, *Islam and Modernity* (Chicago: University of Chicago Press, 1984), 8.
15. Al-Amidi, *Al-Ihkam*, 3:140.
16. Abu Dawud, *Sunan*, (n.p.: n.d.), 3:1013, hadith no. 3567; Al-Bukhari, *al-Sahih* (n.p.: n.d.), 8:157.
17. Abu Dawud, *Sunan*, (n.p.: n.d.), 3:3585, 1019; Ibn `Abd al-Bar, *Jami` Bayan al-`Ilm*, ed. Muhammad `Abd al-Qadir Ata (Beirut: Mu'assasat Kutub al-Saqafiyyah, 1997), 2:275-76.
18. Muhammad Dasuqi, *Al-Ijtihad wa al-Taqlid fi al-Shari`ah al-Islamiyah* (Doha: Dar al-Thaqafah, n.d.), 39.
19. Ibn Manzur, *Lisan al-`Arab* (Cairo: Taba`ah Bulaq, n.d.), 14:291, 295, 297, 299; Ibn al-Qayyim, *I`lam al-Muwaqqi`in min Rabb al-`Ālamin*, ed. `Abd al-Rahman al-Wakil (Cairo: n.d.), 1:113.
20. Ibn Manzur, *Lisan al-`Arab*, 14:300, 301.
21. Ibn al-Qayyim, *I`lam*, 1:113.
22. Al-Raghib al-Isfahani, *Mufradat fi Gharib al-Qur'an*, ed. Muhammad Husayin Kaylani (Beirut: Dar al-Ma`rifah, n.d.), 208, 209.
23. Ibn Khaldun, *Muqaddimah*, ed. `Ali `Abd al-Wahid Wafi (Cairo: Nahdat al-Misr, n.d.), 3:1061-62.
24. Ibn Hazm, *Mulakhkhas Ibtal al-Qiyas wa al-Ra'y wa al-Istihsan wa al-Taqlid wa al-Ta`lil*, ed. Sa`id al-Afghani (Damascus: Matba`ah al-Jami`at al-Dimashq, 1960), 4.

25. Bashir Idris Jum'ah, *Al-Ra'y wa Atharuh fi al-Fiqh al-Islami* (Cairo: n.d.), 24.
26. Ibid., 10.
27. Imam al-Shafi`i, *Jima` al-`Ilm*, ed. Muhammad Ahmad `Abd al-`Aziz (Beirut: Dar al-Kutub al-`Ilmiyyah, n.d.), 51-52.
28. Al-Ghazzali, *Al-Mustasfa*, 2:255.
29. `Abd al-Wahhab Khallaf, *Masadir al-Tashri` al-Islami fi ma la Nassah fih* (Kuwait: Dar al-Qalam li al-Nashr wa al-Tawzi`, 1993), 8; Muhammad Mustafa Shalabi, *Al-Madkhal fi al-Ta`rif al-Fiqh al-Islami* (Beirut: Dar an-Nahdat al-`Arabiyyah, 1985), 108; Muhammad Abu Zahrah, *Tarikh Madhahib al-Islamiyah* (Beirut: Dar al-Fiqr al-`Arabi, n.d.), 244.
30. Al-Sarakhsi, *Usul*, 2:106.
31. Khallaf, *Masadir*, 7.
32. Al-Shawkani, *Irshad*, 202.
33. *Kalalah* are those who inherit from a person who dies leaving neither ascendants nor descendants.
34. Ibn al-Qayyim, *I`lam*, 1:122; Fathi Dirini, *Al-Manahij al-Usuliyah fi al-Ijtihad bi al-Ra'y fi al-Tashri` al-Islami* (Damascus: al-Sharikat al-Muttahidah, 1985), 12-14.
35. Al-Amidi, *Ihkam*, 4:398-99; Ibn al-Qayyim, *I`lam*, 1:257-61; `Ali ibn Muhammad al-Bazdawi al-Hanafi, *Usul al-Bazdawi on the margin of `Abd al-`Aziz al-Bukhari Khashf al-Asrar* (Istanbul: 1308 AH), 3:205; reprint: Beirut: Dar al-Kitab al-`Arabi 1394/1974.
36. Muhammad Sallam Madkur, *Al-Ijtihad fi al-Tashri` al-Islami* (Cairo: Dar al-Nahdat al-`Arabiyyah, 1984), 40-41. For more information, see Bashir Idris Jum`ah, *Al-Ra'y wa Asaruh fi al-Fiqh al-Islami*, 16-18.
37 Al-Bukhari, *Kashf*, 3:205-06; Ibn Hazm, *Al-Ihkam*, 5:127-28.
38. Ibn Humam, *Tahrir*, 4:183; Ibn `Abd al-Shakur, *Musallam*, 2:366.
39. Abu Dawud, *Sunan,* 3:1017, hadith no. 3578; al-Sayyid `Abd al-Latif Kassab, *Adwa'*, 58.
40. Khallaf, *Khulasat al-Tarikh al-Tashri` al-Islami* (Istanbul: al-Maktabat al-Islamiyyah, 1984), 284; Hayreddin Karaman, *Yeni gelismeler karsisinda Islam Hukuk* (Istanbul: Iz Yayincilik, 1998), 56.
41. Karaman, *Yeni gelismeler*, 56; Zaydan, *Al-Madkhal*, 110.
42. Al-Shawkani, *Irshad*, 255.
43. Al-Ghazzali, *Mustasfa*, 2:104; al-Shawkani, *Irshad*, 256.
44. Kassab, *Adwa'*, 61.
45. Muslim, *Al-Jami` al-Sahih* (Istanbul: 1981), 140.
46. Al-Bukhari, "Wasaya," 19; Muslim, "Nadhr," 1.
47. Ibn al-Qayyim, *I`lam*, 1:258.
48. Al-Bukhari, "I'tisam," 12; Muslim, "Lian," 18.
49. Sha`ban, *Islam Hukuk Ilminin Esaslari*, 176-77.
50. Al-Bukhari, "Salam," 1, 2; Muslim, "Musaqat," 25; Tirmidhi, "Buyu`," 70; Abu Dawud, "Buyu`," 57; Nasai, "Buyu`," 63.

51. `Abd al-`Aziz Khayyat, *Nazariyat al-`Urf* (Amman: Maktabat al-Aqsa', 997), 116-17.
52. Al-Ghazzali, *Mustasfa*, 2:354; al-Amidi, *Al-Ihkam*, 4:407; Badishah, *Taysir*, 4:193.
53. Al-Sarakhsi, *Usul*, 2:93-94, 130-31; al-Shawkani, *Irshad*, 257.
54. Ibn al-Qayyim, *I`lam*, 1:281-82.
55. Muhammad Hamid Allah, "Al-Ijtihad fi `Asr al-Sahabah," *Majallah al-Kulliyah al-Dirasah al-Islamiyah wa al-`Arabiyah* 3, no. 4 (1984): 23.
56. Badishah, *Taysir*, 4:195; al-Amidi, *Al-Ihkam*, 4:408; al-Ghazzali, *Al-Mustasfa*, 2:355; al-Shawkani, *Irshad*, 257.
57. Narrated from al-Tirmidhi, al-Darimi, *Sunan*; Abu Dawud, 3:1019, hadith no. 3585.
58. Al-Bukhari, "Tayammum", no. 7; Abu Dawud, "Taharah," no. 124.
59. Ahmad, *Musnad*, 4:373, 374; Abu Dawud, "Talaq," 32; Ibn Majah, "Ahkam," no. 20.
60. Muhammad ibn Hassan Hajawi, *Al-Fiqh al-Sami fi Tarikh al-Fiqh al-Islami* (Cairo: Dar al-Turath, 1396), 1:94.
61. Al-Bukhari, "Kashf," 4:3.
62. Sha`ban, *Islam Hukuk Ilminin Esaslari*, 162-63.
63. Ibid.
64. Usamah Hamawi, *Nazariyat al-Istihsan*, (Beirut: Dar al-Khayr, 1992), 123. (MA dissertation at Damascus University, Faculty of Shari`ah.)
65. Ibid.
66. Zarqa', *Madkhal*, 1:86.
67. Hamza Aktan, "Ticaret Hukukunun Yeni Bazi Problemleri Üzerine Islam Hukuku Açisindan Bir Degerlendirme," in *I. Uluslararasi Islam Ticaret Hukukunun Günümüzdeki Meseleleri Kongresi* (Konya: 1996), 210.
68. Aktan, "Ticaret," 211. For more examples, see Hamawi, *Nazariyat al-Istihsan*, 125-31; Muhammad Farfur, *Nazariyat al-Istihsan fi al-Tashri` al-Islami wa Silatuha bi al-Maslahat al-Mursalah* (Syria: Dar al-Dimashq, 1987), 26-36.
69. Muhammad Rawwas Qalahji, *Mu`jam Lughat al-Fuqaha'* (Beirut: Dar an-Nafa'is, 1988), 248.
70. Abu Dawud, "Buyu`," no. 70; al-Tirmidhi, "Buyu`," no. 19; al-Nasa'i, "Buyu`," no. 60.
71. Al-Bukhari, "Salam," nos. 1, 2; Muslim, "Musaqat," 25; Abu Dawud, "Buyu`," 57.
72. Sha`ban, *Islam Hukuk Ilminin Esaslari*, 163-64; Hamawi, *Nazariyat*, 135-36.
73. Ahmad, *Musnad*, 4:181; Abu Dawud, "Hudud," 19.
74. Hamawi, *Nazariyat*, 138-39.
75. Ibn Nujaym, *Al-Ashbah wa al-Naza'ir* (Beirut: Dar al-Kutub al-`Ilmiyyah, 1985), 89.
76. Ibn Hisham, *Al-Sirat al-Nabawiyah*, eds. Mustafa al-Saqa, Ibrahim al-Abyari, and `Abd al-Hafiz Shalabi (Beirut: Dar al-Khayr, 1992), 2:197-98; al-Sarakhsi, *Usul*, 2:91; al-Bukhari, "Kashf," 3:210.

77. Karaman, *Islam Hukuk Tarihi* (Istanbul: Iz Yayincilik, 1999), 71.
78. Al-Sarakhsi, *Usul*, 2:91-92; al-Bukhari, *Kashf*, 3:210.
79. Aktan, *Ticaret*, 211-12; Hamawi, *Nazariyat*, 140.
80. Abu Dawud, "Buyu`," 51; al-Tirmidhi, "Buyu`," 73.
81. Baji, *Al-Muntaqa*, 5:18.
82. Shalabi, *Ta'lil*, 79; Sha`ban, "Islam Hukuk Ilminin Esaslari," 108.
83. Muhammad ibn Hasan al-Shaybani, *Kitab al-Āthar* (Lahore: 1329 AH), 102.
84. Shalabi, *Ta'lil*, 80-81; Karaman, *Ictihad*, 89.
85. Schacht, *Introduction*, 48-49.
86. Ibn al-Qayyim, *I`lam*, 1:158-59.
87. Ibid., 1:158; Shalabi, *Ta'lil*, 75; Sha`ban, *Islam Hukuk ilminin Esaslari*, 109.
88. Al-Buhkari, "Talaq," 47; Muslim, "Talaq," 9; Baji, *Al-Muntaqa*, 6:143-44; Malik, *Muwatta'*, 2:597.
89. Baji, *Al-Muntaqa*, 6:145.
90. Shalabi, *Ta'lil*, 77; Karaman, *Ictihad*, 87.
91. Shalabi, *Usul*, 1:267; Ahmad Hasan, *The Early*, 145. See Muharrem Önder, "Hanefi Mezhebinde Istihsan anlayisi ve uygulamasi" (Unpublished Ph.D. diss., The University of Selcuk, Konya, 2000).
92. Hatib, *Al-Faqih*, 1:200; Ibn al-Qayyim, *I`lam*, 1:126.
93. Abu Sulayman, *Al-Fikr*, 32.
94. Ibn Abi Shaybah, *Musannaf*, 3:474; `Abd al-Razzaq, *Musannaf*, 7:176-78.
95. Karaman, *Ictihad*, 67-68; Shalabi, *Ta'lil*, 44-45.
96. See al-Bukhari, "Fara'id," 3; Muslim, "Fara'id," 1, 2; Abu Dawud, "Fara'id," 7; Ibn Majah, "Fara'id," 10. For more on inheritance and its terms (e.g., *`asabah*, *ashabi furud*, and so on), see `Abd al-Rahman I. Doi, *Shari`ah: The Islamic Law* (London: Ta Ha Publishers, 1997), 271-327.
97. The situation of full and consanguine brothers is as follows. If a man has no brothers, he inherits everything. If he has a full brother or a half brother with the same father, the consanguine brother is excluded by the full brother if the latter is considered one of the *`asabah*. When there is no full brother, a consanguine brother has this judgment. If there is a full brother, he excludes the half brother. If nothing remains, they receive nothing unless there are uterine brothers among the heirs, who inherit a third. Then any full siblings, male and female, share equally with the uterine brothers in their third. This partion is called *mushtarikah* (shared). Consanguine brothers do not share with the uterine brothers because they do not have the same mother. The rest of the heirs, males only or females only or both, inherit two-thirds, like the wife, mother or grandfather, and this completes the estate.
98. Shalabi, *Usul*, 1:267; Farrur, *Nazariyat*, 51. For further details on this, see Yasin Dutton, *The Origins*, 108-09.
99. Ya`qub Ibrahim Abu Yusuf, *Kitab al-Kharaj* (Beirut: Dar al-Ma`rifah, 1970), 24-27.
100. Shalabi, *Ta'lil*, 48-56.

101. Malik, *Muwatta'*, 2:871; Ibn Abi Shaybah, *Musannaf*, 5:410, 429.
102. Nadiyah Sharif `Umari, *Ijtihad al-Rasul* (Beirut: 1987), 293-96; Ghalib `Abd al-Kafi Qurashi, *Awwaliyat al-Faruq al-Siyasiyah* (Mansurah, Egypt: Dar al-Wafa, 1990), 402-08.
103. Hasan, *The Early*, 145.
104. Shalabi, *Al-Madkhal*, 218; Karaman, *Ictihad*, 63-73.
105. Karaman, *Ictihad*, 73-74.
106. Hasan, *The Early*, 115.